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18 Counsel for Plaintiff and the Proposed Class

19  
20 UNITED STATES DISTRICT COURT  
21  
22 CENTRAL DISTRICT OF CALIFORNIA  
23  
24 WESTERN DIVISION

25 NICOLAS TORRENT, on Behalf of  
26 Himself and All Others Similarly  
27 Situated,

28 Plaintiff,

vs.

YAKULT U.S.A. INC.,

Defendant.

Case No:

Pleading Type: Class Action

**CLASS ACTION COMPLAINT  
AND DEMAND FOR JURY  
TRIAL**

1 Plaintiff, Nicolas Torrent (“Plaintiff”), through his undersigned attorneys,  
2 upon personal knowledge as to his own acts, and on information and belief as to all  
3 others based upon his own and his attorneys’ investigation, alleges as follows:

4 **NATURE OF THE ACTION**

5 1. Defendant, Yakult U.S.A. Inc. (“Defendant”) manufactures, markets,  
6 distributes, and sell probiotic beverages called Yakult and Yakult Light  
7 (collectively, “Yakult”) which contain a live microorganism named *Lactobacillus*  
8 *casei* Shirota. Defendant claims this probiotic culture is beneficial to human health  
9 and helps balance the digestive system. These claims are contrary to the weight of  
10 scientific evidence. Plaintiff and members of the proposed class were injured  
11 when they bought Yakult in reliance on these false and misleading claims. As  
12 such, Plaintiff seeks relief in this action individually and as a class action on behalf  
13 of all purchasers in the United States of Defendant’s Yakult (the “Class”). Plaintiff  
14 also seeks relief in this action individually and as a class action on behalf of a  
15 subclass of all purchasers in California of Defendant’s Yakult (the “California  
16 Class”).

17 **JURISDICTION AND VENUE**

18 2. This Court has original jurisdiction under 28 U.S.C. § 1332(d)(2) (the  
19 Class Action Fairness Act) because the matter in controversy exceeds the sum or  
20 value of \$5 million, exclusive of interest and costs, and there is diversity of  
21 citizenship between the proposed class members and Defendant.

22 3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because  
23 Plaintiff and Defendant reside in this District; many of the acts and transactions  
24 giving rise to this action occurred in this District; and Defendant (1) is authorized  
25 to conduct business in this District and has intentionally availed themselves of the  
26 laws and markets of this District through the promotion, marketing, distribution,  
27 and sale of Yakult in this District; and (2) is subject to personal jurisdiction in this  
28 District.

1 **PARTIES**

2 4. Defendant Yakult U.S.A. Inc. is a Delaware corporation with its  
3 principal place of business located at 17235 Newhope St. Fountain Valley,  
4 California 92708.

5 5. Defendant manufactures, markets, distributes, and sells Yakult in the  
6 United States, and have done so throughout the Class Period as defined herein.

7 6. Plaintiff is a resident of Los Angeles, California. He purchased  
8 Yakult during the class period (as defined herein) in reliance on Defendant's false  
9 and misleading packaging and advertising claims, as described further herein.

10 **FACTUAL ALLEGATIONS**

11 7. This class action concerns the probiotic drink Yakult, the packaging  
12 of which is depicted below.



# Yakult Nutrition Facts

Yakult is a delicious refreshing drink for everyone. Created in Japan in 1935 by our founder, microbiologist Dr. Minoru Shirota, each bottle of Yakult contains around 8 billion live and active beneficial cultures called **Lactobacillus casei Shirota**. Drink one or two bottles daily to help balance your digestive system and maintain overall health. Enjoy with any meal or anytime throughout the day. Keep refrigerated.

Do not use product if seal or bottle is broken. Completely remove foil top before drinking. This is labeled as a multi pack product, bottles not to be sold individually.

Manufactured by Yakult S.A. DE C.V., Mexico City, Mexico  
Imported by Yakult U.S.A. Inc., Torrance, CA 90503

**Yakult**

[www.yakultusa.com](http://www.yakultusa.com)



## Nutrition Facts

Serving Size 1 bottle (80ml) 2.7oz  
Servings Per Package 5

Amount Per Serving

**Calories** 50

% Daily Value\*

**Total Fat** 0g

**0%**

**Sodium** 20mg

**1%**

**Total Carbohydrate** 12g

**4%**

**Dietary Fiber** 0g

**0%**

**Sugars** 11g

**Protein** 1g

**Calcium** 2%

Not a significant source of saturated fat, trans fat, cholesterol, vitamin A, vitamin C, iron and calories from fat.

\*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories	2,000	2,500
Total Fat	Less than	65g	80g
Saturated Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate	300g	375g	460g
Dietary Fiber	25g	30g	36g

Calories per gram  
Fat 9 • Carbohydrate 4 • Protein 4

**INGREDIENTS:** WATER, SUGAR, SKIM MILK POWDER, GLUCOSE, NATURAL AND ARTIFICIAL FLAVORS, *LACTOBACILLUS CASEI SHIROTA*

0g Fat, 0mg Cholesterol,  
No Preservatives. No Gluten.

8. Yakult was originally introduced in Japan in 1935. Its name derives from the word for yogurt in the Esperanto language. Today, according to Defendants' website ([www.yakultusa.com](http://www.yakultusa.com)), Yakult is the world's leading probiotic beverage.

9. Probiotics are live microorganisms claimed to be beneficial to the host organism. According to the Food and Agriculture Organization of the United Nations (FAO) and World Health Organization (WHO), probiotics are defined as: "Live microorganisms which when administered in adequate amounts confer a health benefit on the host."<sup>1</sup>

<sup>1</sup> Report of a Joint FAO/WHO Expert Consultation on Evaluation of Health and Nutritional Properties of Probiotics in Food Including Powder Milk with Live Lactic Acid Bacteria (October 2001).

1       10. The product's packaging states that "each bottle of Yakult contains  
2 around 8 billion live and active beneficial cultures called *Lactobacillus casei*  
3 Shirota."

4       11. According to Defendant's website, *Lactobacillus casei* Shirota is a  
5 probiotic strain first cultured in the 1930s by microbiologist Dr. Minura Shirota at  
6 the Medical School of Kyoto University. The strain was named in his honor, and  
7 Dr. Shirota went on to incorporate it into a drink for the Japanese market, which  
8 became Yakult.

9       12. Today, Yakult is sold in 31 countries, although the bacteria cultures  
10 are provided from a mother strain from Japan regardless of where the product is  
11 ultimately manufactured or distributed.

12       13. Yakult first entered the United States market in 1999 on the shelves of  
13 Asian grocery stores.

14       14. In 2007, Yakult first became available for sale in general market  
15 grocery stores in the United States.

16       15. The marketing of Yakult in the United States places heavy emphasis  
17 on the health benefits of *Lactobacillus casei* Shirota. For example, the packaging  
18 prominently encourages consumers that, "[d]rinking one or two bottles daily" can  
19 "balance your digestive system and maintain overall health."

20       16. Defendant's website oriented to the United States market contains  
21 numerous statements touting the product's health benefits, such as:

22  
23       How does Yakult work?

24  
25       Yakult is a probiotic; it contains billions of live and active "good  
26 bacteria." Your digestive system naturally contains trillions of all  
27 kinds of bacteria -- some are helpful, some are harmful. When you  
28 drink Yakult daily, it makes it difficult for the bad bacteria to take

1 over. Yakult also gives you more of the good bacteria that may help  
2 balance your digestive system.

3 <http://www.yakultusa.com/#faq>

4  
5 Why drink Yakult?

6  
7 You may not think about your digestive system when you think about  
8 your overall well-being, but that's where good health and proper  
9 nutrition begins. Drinking Yakult daily may help balance your  
10 digestive system. For 75 years, people around the world have been  
11 making Yakult a part of their daily diet – now you can, too!

12  
13 On top of all the benefits Yakult tastes great! Over 28 million children  
14 and adults around the world enjoy the delicious citrus taste of Yakult  
15 every day.

16  
17 <http://www.yakultusa.com/#faq>

18 17. Yakult is also advertised on television. One ad depicts individuals of  
19 varying ages enjoying the drink while the narrator intones, “With the exclusive  
20 probiotic *Lactobacillus casei* Shirota, Yakult may help balance your digestive  
21 system and support overall health. Yakult. Good health begins inside.”

22 18. Another ad shows a family of four drinking Yakult together in the  
23 kitchen. The narrator states:

24 Today's busy and stressful lifestyle, irregular diet, and aging can lead  
25 to an unbalanced digestive system. That's why there's Yakult, the  
26 delicious probiotic drink that packs good things into a small package.  
27 Created over 70 years ago, Yakult's exclusive *Lactobacillus casei*  
28 Shirota helps maintain the balance of your digestive system. Millions

1 of families around the world enjoy the benefits of drinking Yakult  
2 every day, and now you can too. Introducing Yakult. Every Day.  
3 For Every Body.

4 19. Another ad is a whimsical animation depicting the invention and  
5 distribution of Yakult around the world, as the narrator states:

6 Once upon a time a microbiologist named Dr. Shirota shared his discovery  
7 with the world. It was a unique strain of probiotic bacteria named  
8 *Lactobacillus casei* Shirota which he used to create Yakult in support of  
9 good health. Now millions of families, from East to West, balance their  
10 digestive systems with Yakult. Here's to you, Dr. Shirota!

11 20. Defendant's advertising claims about Yakult are and have been the  
12 subject of an extensive and comprehensive, nationwide marketing campaign from  
13 2007 to the present and continuing.

14 21. Yakult is sold in packs of five bottles, each holding 2.7 ounces of  
15 product. A five-pack typically retails for approximately \$3.60.

16 22. Defendant's emphasis on Yakult's purported health benefits has  
17 enabled them to command a substantial premium in comparison to competing  
18 yogurt drinks that do not contain probiotics, or the *Lactobacillus casei* Shirota  
19 strain.

20 23. Defendant's labeling and advertising claims are false and deceptive  
21 because they imply that Yakult is healthier than other, less costly beverages that do  
22 not contain probiotics or the *Lactobacillus casei* Shirota strain, and because they  
23 imply that Yakult makes a more significant contribution to digestive health than it  
24 actually does.

25 24. There is no credible scientific evidence that the probiotics in Yakult  
26 do anything to promote digestive health or human health more generally.

1       25. For example, in 2010 a scientific panel of the European Food Safety  
 2 Authority (EFSA) published an opinion on the health benefits of *Lactobacillus*  
 3 *casei* Shirota. The EFSA panel concluded based on the available evidence that,  
 4 contrary to claims advanced by one of Yakult Honsha's European subsidiaries, "a  
 5 cause and effect relationship has not been established" between consumption of the  
 6 probiotic and maintenance of immune defenses.<sup>2</sup>

7       26. In a separate study, the EFSA also concluded that general claims  
 8 regarding probiotics' salutary effect on the immune system and digestive health  
 9 lack sound scientific basis. As the United Kingdom-based newspaper *The*  
 10 *Guardian* reported, the EFSA concluded that the evidence submitted by the  
 11 probiotics industry "to support its claims that various food additives could  
 12 strengthen the body's defences, improve immune function and reduce gut problems  
 13 were either so general as to be inadmissible, or could not be shown to have the  
 14 claimed effect."<sup>3</sup>

15       27. In September 2014, scientists at the University College of London  
 16 published the results of an experiment examining the effects of commercially  
 17 available probiotic products. The study found that the bacteria contained in Yakult  
 18 failed to withstand the stomach's acidic environment or flourish in the small  
 19 intestine.<sup>4</sup> These findings run directly contrary to Defendant's health claims.

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20  
 21 <sup>2</sup> See Scientific Opinion on the substantiation of a health claim related to  
 22 *Lactobacillus casei* Shirota and maintenance of the upper respiratory tract defense  
 23 against pathogens by maintaining immune defences pursuant to Article 13(5) of  
 24 Regulation (EC) No 1924/2006, EFSA Journal 2010;8(10): 1860.

25 <sup>3</sup> See Probiotic health claims ruled unproven, The Guardian (UK), (Oct. 19, 2010)  
 26 (<http://www.guardian.co.uk/society/2010/oct/19/efsa-rules-probiotic-health-claims-unproven>).  
 27

28 <sup>4</sup> See Probiotic drinks "don't do any good": Study finds "good" bacteria in  
 29 many products does not even reach the small intestine, Daily Mail, (Sept. 11, 2014)  
 30 (<http://www.dailymail.co.uk/health/article-2752798/The-probiotic-drinks-don-t-bring-benefits-Study-finds-good-bacteria-products-does-not-reach-small-intestine.html>)

1       28. During the Class Period, Plaintiff purchased Yakult multiple times,  
2 with his last purchase occurring in October 2014 at Ralphs, 910 Lincoln  
3 Boulevard, Venice, California. Prior to purchasing the Product, Plaintiff read and  
4 relied upon false and misleading statements that were prepared by and/or approved  
5 by Defendant and its agents and disseminated through the Yakult packaging. For  
6 each purchase, he understood he was paying for a probiotic beverage bringing  
7 benefits to his digestive system as well as overall health. During the Class Period,  
8 Plaintiff also viewed and relied on Yakult television commercials, which  
9 represented Yakult as a probiotic health drink. But for Defendant's  
10 misrepresentations, Plaintiff would not have purchased Yakult, and/or would not  
11 have paid a premium for Yakult over the price of other beverages that are not  
12 promoted as improving health. Plaintiff thus was damaged by Defendant's  
13 practice.

## CLASS ACTION ALLEGATIONS

15        29. Plaintiff brings this action on behalf of herself and the following Class  
16 in accordance with Rule 23 of the Federal Rules of Civil Procedure.

17 All persons in the United States who purchased Yakult from its  
18 introduction in January 1, 2007 until the date notice is disseminated  
19 for personal or household use, and not for resale or distribution  
20 purposes. Specifically excluded from this Class are Defendant; the  
21 officers, directors, or employees of Defendant; any entity in which  
22 Defendant has a controlling interest; and any affiliate, legal  
23 representative, heir, or assign of Defendant. Also excluded are those  
24 who assert claims for personal injury as well as any federal, state, or  
25 local governmental entities, any judicial officer presiding over this  
26 action and the members of his/her immediate family and judicial staff,  
27 and any juror assigned to this action.

1       30. Plaintiff also brings this action individually and as a class action  
2 pursuant to Federal Rule of Civil Procedure 23 on behalf of all persons located  
3 within the state of California and on behalf of all persons located within the states  
4 with similar consumer protection laws, breach of express warranty laws and breach  
5 of implied warranty laws.

6       31. The Classes defined above are individually so numerous that joinder  
7 of all members is impracticable. While the exact number of members of the  
8 Classes is unknown to Plaintiff at this time, based on the nature of the trade and  
9 commerce involved, Plaintiff reasonably believes that there are thousands of  
10 members in the Classes. Class Members are geographically dispersed throughout  
11 the United States.

12       32. Questions of law and fact common to the Classes include, but are not  
13 limited to:

- 14       a. Whether Defendant conveyed a class-wide message that  
15           Yakult is beneficial to the digestive system, and/or a  
16           class-wide message that Yakult promotes general human  
17           health;
- 18       b. If so, whether Defendant's claims and messages were  
19           material to a reasonable consumer;
- 20       c. If so, whether Defendant's claims and messages were  
21           false (for example, whether Defendant's claims were  
22           scientifically substantiated), or, if not literally false,  
23           whether Defendant's claims were likely to deceive the  
24           public;
- 25       d. Whether Defendant omitted any material information in  
26           making the challenged claims; and
- 27       e. The proper method and measure of the Class's damages.

28       33. Common questions of law and fact exist as to all Class Members and  
29 predominate over any questions affecting solely individual Class Members.

1       34. Plaintiff's claims are typical of the claims of the Class, and she will  
2 fairly and adequately represent the interests of the Class. Plaintiff has retained  
3 counsel experienced with class action litigation and neither she nor her counsel  
4 have any conflicts with or interests adverse or antagonistic to the interests of the  
5 Class.

6       35. A class action is superior to other available methods for the fair and  
7 efficient adjudication of this controversy because joinder of all the Class Members  
8 is impracticable. The prosecution of separate actions by individual Class Members  
9 would impose heavy burdens upon the courts and Defendants, and would create a  
10 risk of inconsistent or varying adjudications of the questions of law and fact  
11 common to all of the Class Members. A class action would achieve substantial  
12 economies of time, effort and expense, and would assure uniformity of decision as  
13 to persons similarly situated without sacrificing procedural fairness. There will be  
14 no material difficulty in the management of this action as a class action on behalf  
15 of the Class Members.

## FIRST CLAIM FOR RELIEF

18 | *Violations of the California Unfair Competition Law, Bus. & Prof. Code §§ 17200 et seq. (Unlawful)*

19       36. Plaintiff repeats and incorporates by reference the allegations set forth  
20 above as if fully set forth herein.

37. Cal. Bus. & Prof. Code § 17200 prohibits any “unlawful, unfair or fraudulent business act or practice.”

23       38. The acts, omissions, misrepresentations, practices, and non-  
24 disclosures of Defendant as alleged herein constitute “unlawful” business acts and  
25 practices in that Defendant’s conduct violates the Consumer Legal Remedies Act,  
26 and the California Sherman Food, Drug, and Cosmetic Law (“Sherman Law”),  
27 which incorporates all the regulations and requirements of the Federal Food, Drug,

1 and Cosmetic Act. Specifically, Defendant acted in contravention of the following  
2 Sherman Law provisions:

- 3 • § 110100 (adopting all FDA regulations as state regulations);
- 4 • § 110290 (“In determining whether the labeling or advertisement of a  
5 food . . . is misleading, all representations made or suggested by  
6 statement, word, design, device, sound, or any combination of these  
7 shall be taken into account. The extent that the labeling or advertising  
8 fails to reveal facts concerning the food . . . or consequences of  
9 customary use of the food . . . shall also be considered.”);
- 10 • § 110390 (“It is unlawful for any person to manufacture, sell, deliver,  
11 hold, or offer for sale any food . . . that is falsely advertised.”);
- 12 • § 110398 (“It is unlawful for any person to advertise any food, drug,  
13 device, or cosmetic that is adulterated or misbranded.”);
- 14 • § 110400 (“it is unlawful for any person to receive in commerce any  
15 food . . . that is falsely advertised or to deliver or proffer for deliver  
16 any such food . . . .”);
- 17 • § 110660 (“Any food is misbranded if its labeling is false or  
18 misleading in any particular.”);
- 19 • § 110670 (“Any food is misbranded if its labeling does not confirm  
20 with the requirements for nutrient content or health claims as set forth  
21 in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the  
22 regulations adopted pursuant thereto.”);
- 23 • § 110680 (“Any food is misbranded if its labeling or packaging does  
24 not conform to the requirements of Chapter 4 (commencing with  
25 Section 110290).”);
- 26 • § 110705 (“Any food is misbranded if any word, statement, or other  
27 information required pursuant to this part to appear on the label or  
28 labeling is not prominently placed upon the label or labeling and in

terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.”);

- § 110760 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded.”);
- § 110765 (“It is unlawful for any person to misbrand any food.”); and
- § 110770 (“It is unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer for delivery any such food.”).

39. By violating the California Unfair Competition Law, Defendant also violated the common law of unfair competition.

40. Defendant leveraged their deception to induce Plaintiff and members of the Classes to buy products that were of lesser value and quality than advertised.

41. Plaintiff suffered injury and fact and lost money or property as a result of Defendant's deceptive advertising: she was denied the benefit of the bargain in purchasing Yakult. Had Plaintiff been aware of Defendant's false and misleading advertising tactics, she would have been willing to pay less than she did for Yakult, or not purchase it at all. Moreover, had Defendant not engaged in the false and misleading advertising tactics, Plaintiff and the members of the Class would have paid less for Yakult because Defendant would not have been able to charge a premium for the produce.

42. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order enjoining Defendant from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign.

43. Plaintiff also seeks an order for the restitution of all monies from the sale of Yakult which were unjustly acquired through acts of unlawful, unfair, and/or fraudulent competition.

## **SECOND CLAIM FOR RELIEF**

## ***Violations of the California Unfair Competition Law, Bus. & Prof. Code §§ 17200 et seq. (Unfair and Fraudulent)***

44. Plaintiff repeats and incorporates by reference the allegations set forth above as if fully set forth herein.

45. Bus. & Prof. Code § 17200 prohibits any “unlawful, unfair or fraudulent business act or practice.”

46. The false and misleading labeling and advertising of Yakult, as alleged herein, constitutes ‘unfair’ business acts and practices because such conduct is immoral, unscrupulous, and offends public policy. Further, the gravity of Defendant’s conduct outweighs any conceivable benefit of such conduct.

47. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein constitute “fraudulent” business acts and practices because Defendant’s conduct is false and misleading to Plaintiff, Class members, and the general public.

48. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order enjoining Defendant from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign.

49. Plaintiff also seeks an order for the restitution of all monies from the sale of Yakult which were unjustly acquired through acts of unlawful, unfair, and/or fraudulent competition.

### THIRD CLAIM FOR RELIEF

***Violation of the California False Advertising Law, Bus. & Prof. Code §§ 17500 et seq.***

50. Plaintiff repeats and incorporates by reference the allegations set forth above as if fully set forth herein.

1       51.    In violation of Bus. & Prof. Code § 17500 *et seq.*, the advertisements,  
2 labeling, policies, acts, and practices described herein were designed to, and did,  
3 result in the purchase and use of Yakult under the false belief that Yakult is  
4 beneficial to the digestive system and human health more generally.

5        52. Defendant knew and reasonably should have known that its  
6 advertising of Yakult was untrue and/or misleading.

7       53. As a result, Plaintiff, the Class members, and the general public are  
8 entitled to injunctive and equitable relief, restitution, and an order for the  
9 disgorgement of the funds by which Defendant was unjustly enriched.

## FOURTH CLAIM FOR RELIEF

## ***Violation of Consumer Legal Remedies Act, Civ. Code §§ 1750, et seq.***

12       54. Plaintiff repeats and incorporates by reference the allegations set forth  
13 above as if fully set forth herein.

14        55. The CLRA prohibits deceptive practices in connection with the  
15 conduct of a business that provides goods, property, or services primarily for  
16 personal, family, or household purposes.

17       56. Defendant's policies, acts, and practices were designed to, and did,  
18 result in the purchase and use of the products primarily for personal, family, or  
19 household purposes, and violated and continue to violate the following sections of  
20 the CLRA:

- § 1770(a)(5): representing that goods have characteristics, uses, or benefits which they do not have;
- § 1770(a)(7): representing that goods are of a particular standard, quality, or grade if they are of another;
- § 1770(a)(9): advertising goods with intent not to sell them as advertised:

- § 1770(a)(6): representing the subject of a transaction has been supplied in accordance with a previous representation when it has not.

57. As a result, Plaintiff and the Class members have suffered irreparable harm and are entitled to injunctive relief pursuant to Cal. Civ. Code § 1782(d).

58. Defendant's conduct described herein was longstanding, was done for profit as a deliberate corporate policy rather than an isolated incident, and was morally wrong, fraudulent, callous, and oppressive.

## **FIFTH CLAIM FOR RELIEF**

## ***Unjust Enrichment on Behalf of the Class, or in the Alternative, on Behalf of the California Class***

59. Plaintiff repeats and incorporates by reference the allegations set forth above as if fully set forth herein.

60. Plaintiff brings this claim individually, as well as on behalf of members of the nationwide Class, under California law. Although there are numerous permutations of the elements of the unjust enrichment cause of action in the various states, there are few real differences. In all states, the focus of an unjust enrichment claim is whether the defendant was unjustly enriched. At the core of each state's law are two fundamental elements – the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff. The focus of the inquiry is the same in each state. Since there is no material conflict relating to the elements of unjust enrichment between the different jurisdictions from which class members will be drawn, California law applies to the claims of the Class.

61. In the alternative, Plaintiff brings this claim individually as well as on behalf of the California Class.

62. At all times relevant hereto, Defendant deceptively labeled, marketed, advertised, and sold Yakult to Plaintiff and the Class.

1       63. Plaintiff and members of the Class conferred upon Defendant non-  
2 gratuitous payments for Yakult that they would not have due to Defendant's  
3 deceptive labeling, advertising, and marketing. Defendant accepted or retained the  
4 non-gratuitous benefits conferred by Plaintiff and members of the Class, with full  
5 knowledge and awareness that, as a result of Defendant's deception, Plaintiff and  
6 members of the Class were not receiving a product of the quality, nature, fitness, or  
7 value that had been represented by Defendant and reasonable consumers would  
8 have expected.

9        64. Defendant has been unjustly enriched in retaining the revenues  
10      derived from purchases of Yakult by Plaintiff and members of the Class, which  
11      retention under these circumstances is unjust and inequitable because Defendant  
12      misrepresented that Yakult has certain health benefits, when in fact they are not,  
13      which caused injuries to Plaintiff and members of the Class because they paid a  
14      price premium due to the mislabeling of Yakult

15        65.    Retaining the non-gratuitous benefits conferred upon Defendant by  
16 Plaintiff and members of the Class under these circumstances made Defendant's  
17 retention of the non-gratuitous benefits unjust and inequitable. Thus, Defendant  
18 must pay restitution to Plaintiff and members of the Class for its unjust enrichment,  
19 as ordered by the Court.

## SIXTH CLAIM FOR RELIEF

21 ***Plaintiff, on Behalf of Himself, the California Class and Classes in the States***  
22 ***with Similar Laws, Alleging Breach of Express Warranty***

23       66. Plaintiff repeats and incorporates by reference the allegations set forth  
24 above as if fully set forth herein.

25       67. Plaintiff brings this Count individually under the laws of the state  
26 where he purchased Yakult and on behalf of: (a) all other persons who purchased

1 Yakult in the same State; and (b) all other persons who purchased Yakult in States  
 2 having similar laws regarding express warranty.

3       68.    Defendant's representations, as described herein, are affirmations by  
 4 Defendant that Yakult is a probiotic beverage with certain health benefits.  
 5 Defendant's representations regarding Yakult are made to Plaintiff and the other  
 6 members of the Classes at the point of purchase and are part of the description of  
 7 the goods. Those promises constituted express warranties and became part of the  
 8 basis of the bargain, between Defendant on the one hand, and Plaintiff and the  
 9 Classes on the other.

10       69.    In addition, or in the alternative, Defendant made each of its above-  
 11 described representations to induce Plaintiff and the Classes to rely on such  
 12 representations, and they each did so rely on Defendant's representations as a  
 13 material factor in their decisions to purchase Yakult. Plaintiff and other members  
 14 of the Classes would not have purchased Yakult but for these representations and  
 15 warranties.

16       70.    Yakult did not, in fact, meet the representations Defendant made  
 17 about Yakult, as described herein.

18       71.    At all times relevant to this action, Defendant falsely represented that  
 19 Yakult was a yogurt beverage with certain health benefits, when in fact it did not  
 20 have such health benefits.

21       72.    At all times relevant to this action, Defendant made false  
 22 representations in breach of the express warranties and in violation of state express  
 23 warranty laws, including:

24

- 25       a.    Alaska St. §45.02.313;
- 26       b.    Ariz. Rev. Stat. Ann. §47-2313;
- 27       c.    Ark. Code Ann. §4-2-313;
- 28       d.    Cal. Com. Code §2313;

- 1 e. Colo. Rev. Stat. §4-2-313;
- 2 f. Conn. Gen. Stat. Ann. §42a-2-313;
- 3 g. D.C. Code §28:2-313;
- 4 h. Fla. Stat. §672.313;
- 5 i. Haw. Rev. Stat. §490:2-313;
- 6 j. 810 Ill. Comp. Stat. 5/2-313;
- 7 k. Ind. Code §26-1-2-313;
- 8 l. Kan. Stat. Ann. §84-2-313;
- 9 m. La. Civ. Code. Ann. art. 2520;
- 10 n. Maine Rev. Stat. Ann. 11 §2-313;
- 11 o. Mass. Gen. Laws Ann. 106 §2-313;
- 12 p. Minn. Stat. Ann. §336.2-313;
- 13 q. Miss. Code Ann. §75-2-313;
- 14 r. Mo. Rev. Stat. §400.2-313;
- 15 s. Mont. Code Ann. §30-2-313;
- 16 t. Neb. Rev. Stat. §2-313;
- 17 u. Nev. Rev. Stat. §104.2313;
- 18 v. N.H. Rev. Stat. Ann. §382-A:2-313;
- 19 w. N.J. Stat. Ann. §12A:2-313;
- 20 x. N.M. Stat. Ann. §55-2-313;
- 21 y. N.Y. U.C.C. Law §2-313;
- 22 z. N.C. Gen. Stat. Ann. §25-2-313;
- 23 aa. Okla. Stat. Ann. tit. 12A, §2-313;
- 24 bb. Or. Rev. Stat. §72.3130;
- 25 cc. Pa. Stat. Ann. tit. 13, §2313;
- 26 dd. R.I. Gen. Laws §6A-2-313;
- 27 ee. S.C. Code Ann. §36-2-313;
- 28 ff. S.D. Codified Laws. §57A-2-313;

- 1 gg. Tenn. Code Ann. §47-2-313;
- 2 hh. Tex. Bus. & Com. Code Ann. §2.313;
- 3 ii. Utah Code Ann. §70A-2-313;
- 4 jj. Vt. Stat. Ann. tit. 9A§2-313;
- 5 kk. Wash. Rev. Code §62A.2-313;
- 6 ll. W. Va. Code §46-2-313;
- 7 mm. Wyo. Stat. Ann. §34.1-2-313;

8  
9 73. The above statutes do not require privity of contract in order to  
10 recover for breach of express warranty.

11 74. As a proximate result of this breach of warranty by Defendant,  
12 Plaintiff and other members of the Classes have been damaged in an amount to be  
13 determined at trial because: (a) they paid a price premium due to the deceptive  
14 labeling of Yakult; and (b) Yakult did not have the attributes, characteristics,  
15 nutritional value, health qualities, or value promised.

16 75. Wherefore, Plaintiff and the Classes demand judgment against  
17 Defendant for compensatory damages, plus interest, costs, and such additional  
18 relief as the Court may deem appropriate or to which Plaintiff and the Classes may  
19 be entitled.

20 **SEVENTH CLAIM FOR RELIEF**

21 ***Plaintiff, on Behalf of Himself, the California Class, and Classes in the States  
22 with Similar Laws, Alleging Breach of Implied Warranty***

23 76. Plaintiff repeats and incorporates by reference the allegations set forth  
24 above as if fully set forth herein.

25 77. Plaintiff brings this Count individually under the laws of the state  
26 where he purchased Yakult and on behalf of: (a) all other persons who purchased  
27

1 Yakult in the same State; and (b) all other persons who purchased Yakult in States  
2 having similar laws regarding implied warranties.

3       78.     The Uniform Commercial Code §2-314 provides that unless excluded  
4 or modified, a warranty that the goods shall be merchantable is implied in a  
5 contract for their sale if the seller is a merchant with respect to goods of that kind.  
6 This implied warranty of merchantability acts as a guarantee by the seller that his  
7 goods are fit for the ordinary purposes for which they are to be used.

8       79.     Defendant developed, manufactured, advertised, marketed, sold,  
9 and/or distributed Yakult and represented that Yakult was fit for a particular use,  
10 specifically that the Product could be used as probiotic beverage with certain  
11 health benefits. Contrary to such representations, Defendant failed to disclose that  
12 Yakult does not benefit the digestive system or human health more generally.

13       80.     At all times, the following states listed below, including the District of  
14 Columbia, have codified and adopted the provisions of the Uniform Commercial  
15 Code governing the implied warranty of merchantability:

- 16       a.     Ala. Code §7-2-314;
- 17       b.     Alaska Stat. §45.02.314;
- 18       c.     Ariz. Rev. Stat. Ann. §47-2314;
- 19       d.     Ark. Code Ann. §4-2-314;
- 20       e.     Cal. Com. Code §2314;
- 21       f.     Colo. Rev. Stat. §4-2-314;
- 22       g.     Conn. Gen. Stat. Ann. §42a-2-314;
- 23       h.     Del. Code Ann. tit. 6 §2-314;
- 24       i.     D.C. Code §28:2-314;
- 25       j.     Fla. Stat. §672.314;
- 26       k.     Ga. Code Ann. §11-2-314;
- 27       l.     Haw. Rev. Stat. §490:2-314;
- 28       m.     Idaho Code §28-2-314;

1       n.     810 Ill. Comp. Stat. Ann. 5/2-314;  
2       o.     Ind. Code Ann. §26-1-2-314;  
3       p.     Iowa Code Ann. §554.2314;  
4       q.     Kan. Stat. Ann. §84-2-314;  
5       r.     Ky. Rev. Stat. Ann. §355.2-314;  
6       s.     La. Civ. Code Ann. art. §2520;  
7       t.     Me. Rev. Stat. Ann. 11 §2-314;  
8       u.     Md. Code Ann. Com. Law §2-314;  
9       v.     Mass. Gen. Laws Ch. 106 §2-314;  
10      w.     Mich. Comp. Laws Ann. §440.2314;  
11      x.     Minn. Stat. Ann. §336.2-314;  
12      y.     Miss. Code Ann. §75-2-314;  
13      z.     Mo. Rev. Stat. §400.2-314;  
14      aa.    Mont. Code Ann. §30-2-314;  
15      bb.    Nev. Rev. Stat. §104.2314;  
16      cc.    N.H. Rev. Stat. Ann. §382-A:2-314;  
17      dd.    N.J. Stat. Ann. §12A:2-314;  
18      ee.    N.M. Stat. Ann. §55-2-314;  
19      ff.    N.Y. U.C.C. Law §2-314;  
20      gg.    N.C. Gen. Stat. Ann. §25-2-314;  
21      hh.    N.D. Cent. Code §41-02-314;  
22      ii.    Ohio Rev. Code Ann. §1302.27;  
23      jj.    Okla. Stat. Ann. tit. 12A §2-314;  
24      kk.    Or. Rev. Stat. §72.3140;  
25      ll.    Pa. Stat. Ann. tit. 13 §2314;  
26      mm.   R.I. Gen. Laws §6A-2-314;  
27      nn.    S.C. Code Ann. §36-2-314;  
28      oo.    S.D. Codified Laws §57A-2-314;

1 pp. Tenn. Code Ann. §47-2-314;  
2 qq. Tex. Bus. & Com. Code Ann. §2-314;  
3 rr. Utah Code Ann. §70A-2-314;  
4 ss. Va. Code Ann. §8.2-314;  
5 tt. Vt. Stat. Ann. tit. 9A §2-314;  
6 uu. W. Va. Code §46-2-314;  
7 vv. Wash. Rev. Code §62A 2-314;  
8 ww. Wis. Stat. Ann. §402.314; and  
9 xx. Wyo. Stat. Ann. §34.1-2-314.

10 81. As developer, manufacturer, producer, advertiser, marketer, seller  
11 and/or distributor of sweetening products, Defendant is a “merchant” within the  
12 meaning of the various states’ commercial codes governing the implied warranty  
13 of merchantability.

14 82. Further, Defendant is a merchant with respect to Yakult. Defendant  
15 developed, manufactured, produced, advertised, marketed, sold, and/or distributed  
16 Yakult and represented to Plaintiff and the Classes that it developed Yakult as a  
17 probiotic beverage providing certain health benefits. Further, Defendant, by  
18 selling Yakult to Plaintiff and the Classes has held itself out as a retailer of the  
19 product and, in fact, has derived a substantial amount of revenues from the sale of  
20 the product.

21 83. Yakult can be classified as “goods,” as defined in the various states’  
22 commercial codes governing the implied warranty of merchantability.

23 84. As a merchant of Yakult, Defendant knew that purchasers relied upon  
24 them to develop, manufacture, produce, sell, and distribute a product that could be  
25 used as a probiotic beverage providing certain health benefits, as promised.

26 85. Defendant developed, manufactured, produced, sold, and distributed  
27 Yakult to consumers such as Plaintiff and the Classes. It knew that the product  
28 would be used as a probiotic beverage providing certain health benefits.

1       86. Defendant specifically represented in its labeling of the product that it  
2 is a probiotic beverage providing certain health benefits, as described herein.

3       87. At the time that Defendant developed, manufactured, sold, and/or  
4 distributed Yakult, Defendant knew the purpose for which the product was  
5 intended and impliedly warranted that the product was of merchantable quality and  
6 was fit for its ordinary purpose – a probiotic beverage providing certain health  
7 benefits.

8       88. Defendant breached its implied warranties in connection with the sale  
9 of Yakult to Plaintiff and members of the Classes. The product was not fit for its  
10 ordinary purposes and intended use as a probiotic beverage providing certain  
11 health benefits, because Yakult does not actually provide any health benefits.

12       89. Defendant had actual knowledge that Yakult does not actually provide  
13 any health benefits and Plaintiff therefore was not required to notify Defendant of  
14 its breach. If notice is required, Plaintiff and the Classes adequately have provided  
15 Defendant of such notice through the filing of this lawsuit.

16       90. As a direct and proximate result of Defendant's breach of implied  
17 warranties, Plaintiff and other members of the Classes have been injured. Plaintiff  
18 and the other members of the Classes would not have purchased Yakult but for  
19 Defendant's representations and warranties. Defendant misrepresented the  
20 character of the product, which caused injuries to Plaintiff and the other members  
21 of the Classes because either they paid a price premium due to the deceptive  
22 labeling or they purchased products that were not of a character and fitness as  
23 promised and therefore had no value to Plaintiff and the other members of the  
24 Classes.

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## **EIGHTH CLAIM FOR RELIEF**

***Plaintiff, on Behalf of Himself and Classes in the States with Similar Laws,  
Alleging Violation of the Consumer Fraud Laws of the Various States***

91. Plaintiff repeats and incorporates by reference the allegations set forth above as if fully set forth herein.

92. Plaintiff brings this Count individually under the laws of the state where he purchased Yakult and on behalf of all other persons who purchased Yakult in States having similar laws regarding consumer fraud and deceptive trade practices.

93. Plaintiff and each of the other members of the Classes are consumers, purchasers, or other persons entitled to the protection of the consumer protection laws of the State in which they purchased the Product.

94. The consumer protection laws of the State in which Plaintiff and the other members of the Classes purchased the Product declare that unfair or deceptive acts or practices, in the conduct of trade or commerce, are unlawful.

95. Forty States and the District of Columbia have enacted statutes designed to protect consumers against unfair, deceptive, fraudulent, and unconscionable trade and business practices and false advertising and that allow consumers to bring private and/or class actions. These statutes are found at:

- a. Alabama Deceptive Trade Practices Act, Ala. Code §8-19-1 *et seq.*;
- b. Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Code §45.50.471 *et seq.*;
- c. Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §4-88-101 *et seq.*;
- d. California Consumer Legal Remedies Act, Cal. Civ. Code §1750 *et seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 *et seq.*;

- 1       e.     Colorado Consumer Protection Act, Colo. Rev. Stat. §6-1-101 *et seq.*;
- 2       f.     Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a *et*
- 3 *seq.*;
- 4       g.     Delaware Deceptive Trade Practices Act, Del. Code tit. 6§2511 *et*
- 5 *seq.*;
- 6       h.     District of Columbia Consumer Protection Procedures Act, D.C. Code
- 7 §28 3901 *et seq.*;
- 8       i.     Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann.
- 9 §501.201 *et seq.*;
- 10      j.     Georgia Fair Business Practices Act, Ga. Code Ann. §10-1-390 *et*
- 11 *seq.*;
- 12      k.     Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statues
- 13 §480-1 *et seq.*, and Hawaii Uniform Deceptive Trade Practices Act, Haw. Rev.
- 14 Stat. §481A-1 *et seq.*;
- 15      l.     Idaho Consumer Protection Act, Idaho Code Ann. §48-601 *et seq.*;
- 16      m.     Illinois Consumer Fraud and Deceptive Business Practices Act, 815
- 17 Ill. Comp. Stat. Ann. 505/1 *et seq.*;
- 18      n.     Kansas Consumer Protection Act, Kan. Stat. Ann §50 626 *et seq.*;
- 19      o.     Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §367.110 *et*
- 20 *seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §365.020 *et*
- 21 *seq.*;
- 22      p.     Louisiana Unfair Trade Practices and Consumer Protection Law, La.
- 23 Rev. Stat. Ann. §51:1401 *et seq.*;
- 24      q.     Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5 §205A *et seq.*,
- 25 and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. tit. 10,
- 26 §1211 *et seq.*,
- 27      r.     Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws
- 28 ch. 93A;

- 1       s.     Michigan Consumer Protection Act, Mich. Comp. Laws §445.901 *et*
- 2     *seq.*;
- 3       t.     Minnesota Prevention of Consumer Fraud Act, Minn. Stat.
- 4     Ann. §325F.68 *et seq.*, and Minnesota Uniform Deceptive Trade Practices Act,
- 5     Minn. Stat. §325D.43 *et seq.*;
- 6       u.     Mississippi Consumer Protection Act, Miss. Code Ann. §§75-24-1 *et*
- 7     *seq.*;
- 8       v.     Missouri Merchandising Practices Act, Mo. Rev. Stat. §407.010 *et*
- 9     *seq.*;
- 10      w.     Montana Unfair Trade Practices and Consumer Protection Act, Mont.
- 11     Code Ann. §30-14-101 *et seq.*;
- 12      x.     Nebraska Consumer Protection Act, Neb. Rev. Stat. §59-1601 *et seq.*,  
13     and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §87-301  
14     *et seq.*;
- 15      y.     Nevada Trade Regulation and Practices Act, Nev. Rev. Stat.  
16     §598.0903 *et seq.*;
- 17      z.     New Hampshire Consumer Protection Act, N.H. Rev. Stat. §358-A:1  
18     *et seq.*;
- 19      aa.    New Jersey Consumer Fraud Act, N.J. Stat. Ann. §56:8 1 *et seq.*;
- 20      bb.    New Mexico Unfair Practices Act, N.M. Stat. Ann. §57 12 1 *et seq.*;
- 21      cc.    New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law  
22     §349 *et seq.*;
- 23      dd.    North Dakota Consumer Fraud Act, N.D. Cent. Code §51 15 01 *et*  
24     *seq.*;
- 25      ee.    Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. §1345.02  
26     and 1345.03; Ohio Admin. Code §109:4-3-02, 109:4-3-03, and 109:4-3-10;
- 27      ff.    Oklahoma Consumer Protection Act, Okla. Stat. tit. 15 §751 *et seq.*;
- 28      gg.    Oregon Unfair Trade Practices Act, Ore. Rev. Stat §646.608(e) & (g);

- 1                   hh.    Rhode Island Unfair Trade Practices And Consumer Protection Act,
- 2   R.I. Gen. Laws §6-13.1-1 *et seq.*;
- 3                   ii.     South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-5-10
- 4 *et seq.*;
- 5                   jj.     South Dakota's Deceptive Trade Practices and Consumer Protection
- 6 Law, S.D. Codified Laws §§37 24 1 *et seq.*;
- 7                   kk.    Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-101 *et*
- 8 *seq.*;
- 9                   ll.     Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9, §2451 *et seq.*;
- 10                  mm.    Washington Consumer Fraud Act, Wash. Rev. Code §19.86.010 *et*
- 11 *seq.*;
- 12                  nn.    West Virginia Consumer Credit and Protection Act, West Virginia
- 13 Code §46A-6-101 *et seq.*; and
- 14                  oo.    Wisconsin Deceptive Trade Practices Act, Wis. Stat. §100.18 *et seq.*
- 15                  96.    Yakult constitutes a product to which these consumer protection laws
- 16 apply.

17                  97.    In the conduct of trade or commerce regarding its production,  
18 marketing, and sale of the product, Defendant engaged in one or more unfair or  
19 deceptive acts or practices, including, but not limited to, uniformly representing to  
20 Plaintiff and each member of the Classes by means of its packaging and labeling of  
21 Yakult that it is a probiotic beverage providing certain health benefits.

22                  98.    Defendant's representations and omissions were false, untrue,  
23 misleading, deceptive, and/or likely to deceive.

24                  99.    Defendant knew, or should have known, that its representations and  
25 omissions were false, untrue, misleading, deceptive, and/or likely to deceive.

26                  100.    Defendant used or employed such deceptive and unlawful acts or  
27 practices with the intent that Plaintiff and members of the Classes rely thereon.

28                  101.    Plaintiff and the other members of the Classes did so rely.

1 102. Plaintiff and the other members of the Classes purchased the product  
2 produced by Defendant which misrepresented the characteristics and nature of the  
3 product.

4 103. Plaintiff and the other members of the Classes would not have  
5 purchased the product but for Defendant's deceptive and unlawful acts.

6 104. As a result of Defendant's conduct, Plaintiff and the other members of  
7 the Classes sustained damages in amounts to be proven at trial.

8        105. Defendant's conduct showed complete indifference to, or conscious  
9 disregard for, the rights and safety of others such that an award of punitive and/or  
10 statutory damages is appropriate under the consumer protection laws of those states  
11 that permit such damages to be sought and recovered.

## PRAYER FOR RELIEF

13           WHEREFORE, Plaintiff prays for judgment and relief against Defendant as  
14 follows:

15       A. that the Court certify the nationwide Class and the California Class  
16 under Rule 23 of the Federal Rules of Civil Procedure and appoint Plaintiff as  
17 Class Representative and his attorneys as Class Counsel to represent the members  
18 of the Classes:

19           B.     that the Court declare that Defendant's conduct violates the statutes  
20 referenced herein:

21 C. that the Court preliminarily and permanently enjoin Defendant from  
22 conducting its business through the unlawful, unfair, or fraudulent business acts or  
23 practices, untrue, and misleading labeling and marketing and other violations of  
24 law described in this Complaint;

25 D. that the Court order Defendant to conduct a corrective advertising and  
26 information campaign advising consumers that Yakult does not have the  
27 characteristics, uses, benefits, and quality Defendant has claimed:

1       E.     that the Court order Defendant to implement whatever measures are  
2 necessary to remedy the unlawful, unfair, or fraudulent business acts or practices,  
3 untrue and misleading advertising, and other violations of law described in this  
4 Complaint;

5 F. that the Court order Defendant to notify each and every individual  
6 and/or business who purchased Yakult of the pendency of the claims in this action  
7 in order to give such individuals and businesses an opportunity to obtain restitution  
8 from Defendant;

9       G.     that the Court order Defendant to pay restitution to all  
10 affected persons all funds acquired by means of any act or practice declared by this  
11 Court to be an unlawful, unfair, or a fraudulent business act or practice, untrue or  
12 misleading labeling, advertising, and marketing, plus pre- and post-judgment  
13 interest thereon;

14        H.      that the Court order Defendant to disgorge all monies wrongfully  
15 obtained and all revenues and profits derived by Defendant as a result of its acts or  
16 practices as alleged in this Complaint;

I. that the Court award damages to Plaintiff and the Classes;

18 J. the common fund doctrine, and/or any other appropriate legal theory;  
19 and

20           K.    that the Court grant such other and further relief as may be just and  
21 proper.

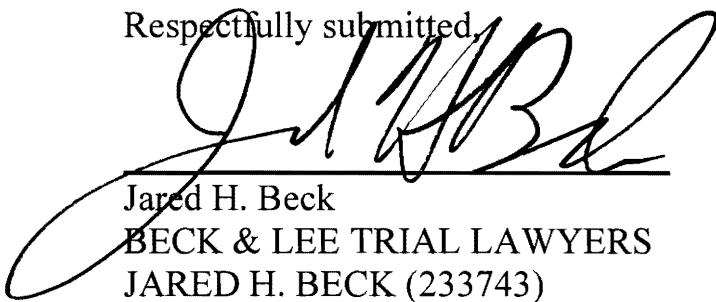
## DEMAND FOR JURY TRIAL

23 Plaintiff hereby demands trial by jury in this action on all issues so triable.

24 || *~signature page follows~*

1 DATED: January 27, 2015  
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Respectfully submitted,

  
Jared H. Beck  
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Counsel for Plaintiff and the Proposed Class